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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

COUNTY OF SAN BERNARDINO,

Plaintiff and Respondent,

v.

BANKERS INSURANCE COMPANY,

Defendant and Appellant.

E052762

(Super.Ct.Nos. CIVVS1006456,
CIVVS1006457 & FVI1000055)

OPINION

APPEAL from the Superior Court of San Bernardino County. Eric M. Nakata,
Judge. Affirmed.

Law Offices of Brendan Pegg and Brendan Pegg for Defendant and Appellant.

Jean-Rene Basle, County Counsel, and John R. Tubbs II, Deputy County Counsel,
for Plaintiff and Respondent.

Defendant and appellant Bankers Insurance Company (Bankers), a bail surety,
seeks relief from an order of bail forfeiture. In two separate motions, Bankers sought an
extension of the 185-day period in which criminal defendant Gustavo Ortega could be
returned to custody in order to avoid forfeiture of certain bonds posted on his behalf.

Alternatively, Bankers sought to have the bonds vacated and exonerated. On August 20, 2010, the trial court denied Bankers' motions on the ground there was insufficient information as to the whereabouts of Ortega. On September 29, 2010, the court entered summary judgment against Bankers on each bond in favor of plaintiff and respondent County of San Bernardino (the County). On January 10, 2011, Bankers appealed, contending the order denying its motions should be reversed and the subsequently entered summary judgments should be set aside. We affirm.

I. PROCEDURAL BACKGROUND AND FACTS

On or about November 16, 2009, Bankers posted bond No. 520002431-6 in the amount of \$200,000 for a felony charge, and bond No. 555050069-6 in the amount of \$5,000 for an unrelated misdemeanor charge, warranting the appearance of Ortega in San Bernardino County court for arraignment on January 14, 2010. On November 20, Ortega was arrested on a no bail probation violation by the Los Angeles County Sheriff, and he was held in custody as inmate No. 2136689. On December 15, 2009, the Los Angeles County Sheriff's Department certified that Ortega was in its custody and had been since November 20, 2009, on an unrelated case and warrant.

Given his custody status in Los Angeles County, on January 14, 2010, Ortega failed to appear in San Bernardino County case Nos. FVI1000055 and 2938643GO. The bail bonds posted by Bankers were ordered forfeited and notice was sent to Bankers and the bail agent. That same day, a printout from the Los Angeles County Sheriff's Department Web site showed Ortega in custody, with his next Los Angeles County court

date scheduled for January 21. The hold listed is from an unrelated San Bernardino County case No. 3010244GO.

On July 15, 2010, Bankers, as real party in interest, filed two separate motions to toll time on bail bond pursuant to Penal Code¹ section 1305, subdivision (e) regarding the two bonds that had been deemed forfeited. Each motion sought an order extending the forfeiture period “for a period that would allow time for [Ortega] to either be transported to the court or to finish his sentence and be returned when his warrant is served upon release,” or in the alternative, exonerating the bond “since [Ortega] is in the custody of the state and beyond the control of the bail agent.” While exhibits attached to each motion identified Ortega as having been in custody at the Men’s Central Jail in Los Angeles on January 14, 2010, the motion stated that Ortega was in custody at the Arizona State Prison in Florence, Arizona. Further, the moving papers claimed that Ortega was released from the Men’s Central Jail in Los Angeles to the California Department of Corrections, North Kern County State Prison, on February 12, 2010; however, no declaration or exhibit was provided with either motion supporting such claim.

On August 20, 2010, at the hearing on the motions, the trial court noted there was a request for an extension of time, to which Bankers replied it was requesting exoneration. The trial court denied the request and further denied the motions on the grounds there was insufficient information as to Ortega’s whereabouts. At the end of the

¹ All further statutory references are to the Penal Code unless otherwise indicated.

hearing, the court informed Bankers if it could show that Ortega was actually in a facility, then they could “deal with the issue of forfeiture.”

No further motions were filed by Bankers. Thus, on September 29, 2010, summary judgment was entered in both bond cases against Bankers in favor of the County. The felony case identified as case No. FVI1000055 was identified as “Civil Case No: CIVVS1006456,” while the misdemeanor case identified as case No. 2938643GO was identified as “Civil Case No: CIVVS10066457.” On January 10, 2011, Bankers filed its notice of appeal of the orders denying its motions to toll time entered on August 20, 2010.

On March 11, 2011, this court directed the parties “to discuss in their briefs on appeal, the questions whether an order denying a motion to toll time is an appealable order and whether this court has jurisdiction to consider the appeal in Superior Court Case No. CIVVS1006457 since it involves a bail forfeiture on a misdemeanor charge and was filed as a complaint of limited jurisdiction.”

II. APPEALABILITY OF ORDER DENYING MOTION TO TOLL TIME

Neither party provided a clear answer as to whether the order denying Bankers’ motion to toll time is an appealable order. Instead, Bankers first analogized its motion to toll time as a request for relief from forfeiture, and argued that the denial of its motion is “appealable on the theory that [it is] substantially a final determination at the trial court level of issues affecting the surety.” Bankers cites *People v. National Auto. & Cas. Co.* (1966) 242 Cal.App.2d 150, superseded by statute as stated in *People v. The North River Ins. Co.* (2011) 200 Cal.App.4th 712, 720, fn. 4, and *People v. Wilcox* (1960) 53 Cal.2d

651. Alternatively, Bankers analogizes its motion to a request for an extension of time and notes that such request is not itself appealable. The People also note that an order tolling the forfeiture period is similar to an order extending the forfeiture period, and suggest guidance from *People v. Alistar Ins. Co.* (2003) 115 Cal.App.4th 122, and *People v. Lexington National Ins. Corp.* (2010) 181 Cal.App.4th 1485.

Notwithstanding the above, both parties agree that whether or not the order is appealable, this court may construe the notice of appeal as referring to the summary judgment that was entered thereafter. In *People v. Seneca Ins. Co.* (2004) 116 Cal.App.4th 75, the surety sought relief from an order of bail forfeiture by moving for an extension of the 185-day period in which the defendant could be returned to custody in order to avoid the forfeiture. (*Id.* at p. 78.) The trial court denied the motion and Seneca appealed. Our colleagues in the Second Appellate District, Division Six, observed: “Seneca’s notice of appeal purports to appeal from the trial court’s order denying its motion to extend the 185-day period under section 1305.4. That order, however, is not appealable. On this court’s motion, the record on appeal was augmented to include the trial court’s order granting summary judgment against Seneca. We treat Seneca’s appeal from the denial of its extension motion as an appeal from the subsequently entered summary judgment. [Citation.]” (*Id.* at pp. 79-80.)

Here, the record on appeal includes the orders granting summary judgment against Bankers. Accordingly, we will treat Bankers’ appeal as an appeal from the subsequently entered summary judgments.

III. JURISDICTION TO HEAR APPEAL FROM CASE INVOLVING A BAIL FORFEITURE ON A MISDEMEANOR CHARGE

Because this appeal involves bail forfeiture on two separate bonds, one on a misdemeanor charge and the other on a felony charge, we requested briefing on the issue of “whether this court has jurisdiction to consider the appeal in Superior Court Case No. CIVVS1006457 since it involves a bail forfeiture on a misdemeanor charge and was filed as a complaint of limited jurisdiction.” Bankers failed to address this issue in its opening brief.

“‘There is no constitutional right to an appeal; the appellate procedure is entirely statutory and subject to complete legislative control.’ [Citations.] Citing a large number of cases, Witkin notes ‘[t]here is no constitutional right to an *appeal or other review* of a judicial decision; thus, the Legislature has power to change the procedure, limit the right, or even abolish the right altogether.’ [Citation.] As . . . noted by our Supreme Court, ‘[a] litigant in a case originating in the municipal court [now in a limited civil case] may not appeal as a matter of right to the Court of Appeal.’ [Citation.]” (*Anchor Marine Repair Co. v. Magnan* (2001) 93 Cal.App.4th 525, 528.) While there is no statutory authority for this court to hear the appeal in Superior Court case No. CIVVS1006457 since it involves bail forfeiture on a misdemeanor charge, it does not make sense for us to consider the merits of Bankers’ issues in the appeal in Superior Court case No. CIVVS1006456, but not case No. CIVVS1006457. Both cases were heard at the same time, the trial court considered the same facts in deciding them, and both involve the same issues on appeal.

California Rules of Court, rule 8.1002, in relevant part, provides: “A Court of Appeal may order a case transferred to it for hearing and decision if it determines that transfer is necessary to secure uniformity of decision or to settle an important question of law.” In order to secure uniformity of decision, and in consideration of judicial economy, we will decide the issues on appeal in case No. CIVVS1006457 with the issues on appeal in case No. CIVVS1006456 and render one opinion.

IV. DISCRETION

Bankers contends the trial court erred in denying its request to toll the time based on the custody status of Ortega.

As the People point out, section 1305, subdivision (e), sets forth the mechanism to toll the bond exoneration period. It requires the “tolling of the 180-day period provided in this section during the period of temporary disability, provided that it appears to the satisfaction of the court that the following conditions are met: [¶] (1) The defendant is temporarily disabled by reason of illness, insanity, or detention by military or civil authorities. [¶] (2) Based upon the temporary disability, the defendant is unable to appear in court during the remainder of the 180-day period. [¶] (3) The absence of the defendant is without the connivance of the bail. [¶] The period of the tolling shall be extended for a reasonable period of time, at the discretion of the court, after the cessation of the disability to allow for the return of the defendant to the jurisdiction of the court.” “[I]t is the surety’s burden to establish that its excuse falls within the provisions of this statute. [Citations.]” (*People v. Amwest Surety Ins. Co.* (1991) 229 Cal.App.3d 351, 355.)

According to the language in the statute, Bankers was required to make a showing that Ortega was physically unable to appear in court at any time between January 14, 2010, and July 18, 2010 (185 days after bonds were ordered forfeited), because he was in the custody of another jurisdiction. The trial court is obligated to exercise its sound discretion in determining whether a defendant's failure to appear is without sufficient excuse. Where the trial court can find sufficient excuse for a defendant's nonappearance, the entirety of the record may supply sufficient reason for allowing the case to be continued. (*People v. Amwest Surety Ins. Co.* (1997) 56 Cal.App.4th 915, 921-926.) The court is free to believe or disbelieve the explanation for nonappearance but "[w]hether another trial court, or even a reviewing court, would have granted defendant a continuance is not the test for abuse of discretion." (*People v. International Fidelity Ins. Co.* (2007) 151 Cal.App.4th 1056, 1061.)

Here, Bankers merely offered a computer printout and the Certification of Prisoner in Custody from Los Angeles County Sheriff's Department. Even if these documents could be considered competent evidence, at best they show that Ortega was in custody in Los Angeles continuously from November 20, 2009, through January 14, 2010. There is no competent evidence of his whereabouts after January 14, 2010. According to Bankers' notice of its motions, Ortega was in custody at the Arizona State Prison. According to its points and authorities, on February 12, 2010, Ortega was moved from Los Angeles to North Kern County State Prison, where he is serving a six-year prison sentence. However, there is no competent evidence to support either of Bankers' claims.

During the time Ortega was on bail he was deemed to be in the custody of his respective bail. (*People v. United Bonding Ins. Co.* (1969) 272 Cal.App.2d 441, 446-447.) If this was not the case, then Bankers was required to provide competent, admissible evidence of his location. Because Bankers failed to do so in this case, the trial court correctly found that the proof failed to show that Ortega was physically unable to put in an appearance before the court at any time during the 180-day period.

V. DISPOSITION

The judgment is affirmed. Costs shall be awarded to plaintiff and respondent.

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HOLLENHORST

Acting P. J.

We concur:

KING

J.

CODRINGTON

J.